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>>> <falklaw@comcast.net> 3/2/2012 10:47 AM >>>

Once again a proposal has been put forward to have the Supreme Court promulgate a rule defining the jurisdiction of the circuit courts and Court of Appeals with respect to appeals from probate court. The entire concept is unconstitutional, a gross usurpation of the exclusive prerogative of the legislature, which has not opted to delegate any authority to the judiciary in this regard.

The Legislature has defined by statute the appellate jurisdiction of both the circuit courts and the Court of Appeals to entertain appeals from probate court. MCL 600.861 and .863. The sole province of the Supreme Court, under its constitutional authority to create rules of procedure, is to promulgate rules specifying the procedure by which such appeals shall be made. This might include time limits for filing an appeal, for filing briefs, for responding to an appeal, etc., formatic requirements, regulation of the form, length and content of briefs, what transcripts must be ordered, and so forth, as the Court has, appropriately, done in MCR 7.204 and 7.212.

"It is no part of the rule-making power to create rules of jurisdiction, still less to do so when the legislature has fulfilled its reserved *and exclusive* constitutional function of defining the appellate jurisdiction of the lower courts by statute. Const 1963, art 6, §§10 and 13. As Justices McAllister and Potter noted in *Jones v Eastern Mich Motorbuses*, 287 Mich 619, 641; 283 NW 710 (1939):

"While the Supreme Court is vested by the Constitution with authority to regulate procedure and practice, nevertheless the rule making powers of the court do not extend to matters of jurisdiction and cannot be used to give new remedies or extend or curtail existing ones provided by the Constitution.

"'The jurisdiction of a court as conferred by the Constitution or statute cannot be enlarged or diminished by a rule of court * * *.

"'Rules of practice and procedure adopted under a practice act are strictly limited to carrying legislation into effect and cannot give new remedies or extend or curtail existing ones.' 15 C.J. 907."

Nor does the Supreme Court have any power, by rule, to put a gloss on such statutes by defining or redefining statutory terminology such as "final order". While the Legislature may create a glossary or assign a word used in a statute a specified meaning, which is then binding on the judiciary in construing or applying the statute, *W S Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345, 350; 91 NW2d 269 (1958); *McRaild v*

Shepard Lincoln Mercury, Inc, 141 Mich App 406; 367 NW2d 404 (1985); *People v Smith*, 246 Mich 293, 403; 224 NW 402 (1929); 1A Sands, Sutherland Statutory Construction (4th ed), §20.08, p. 88. Where the Legislature has not defined statutory terminology, then, as part of the Supreme Court's adjudicative power, it may be called upon to construe that terminology in a proper case, but the Court may not do so by rule--that is judicial legislation. Indeed, the Court cannot, even in a proper case, choose a definition of statutory terminology that either adds or subtracts from the words of the statute as enacted by the Legislature, as this Court has repeatedly and pointedly noted. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004) (calling this rule "an anchoring principle of jurisprudence"); *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 58; 642 NW2d 663 (2002).

In *McDougall v Schanz*, 461 Mich 15, 35; 597 NW2d 148 (1999), this Court recognized the limits on its rule making authority as being strictly confined to the realm of procedure, not substance. Yet the Court seems to have promptly forgotten the lesson of *McDougall*, for it has repeatedly promulgated rules which either create or revise substantive law, including but not limited to MCR 6.401, MCR 7.202(6) (especially 7.202(6)(a)(v)), MCR 7.203, MCR 7.207(A), MCR 8.122, MCR 9.125 and 9.227.

To the extent this Court has by rule created new definitions of statutory terminology unsupported by legislative use of such language, MCL 8.3a, its rules are in excess of its constitutional authority. Const 1963, art 3, §2 and art 4, §1; McDougall v Schanz, supra. Unlike the Supreme Court, which has express constitutional authority to define its own appellate jurisdiction by rule, Const 1963, art 6, §4, the appellate jurisdiction of both the circuit court and the Court of Appeals is "entirely statutory," People v Milton, 393 Mich 234, 245; 224 NW2d 266 (1974)*, and, for the Court of Appeals, is generally limited to final judgments and orders. MCL 600.308(1) and .861. An order denying summary disposition, on any basis (governmental immunity included**), is by definition not a "final judgment", and the Supreme Court is without constitutional authority to redefine the statutory terminology, still less in such a manner as to pervert the words of the statute beyond recognition. People v Mallory, 378 Mich 538, 474 n 4; 147 NW2d 66 (1967) (Souris, J., concurring); WPW Acquisition Co v City of Troy, 466 Mich 117, 123; 643 NW2d 564 (2002), quoting Michigan Coalition of State Employee Unions v Civil Service Comm'n, 465 Mich 212, 223; 634 NW2d 692 (2001) for the principle that "if a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended." The same limitations preclude this Court from creating definitions of statutory phraseology that is a "technical legal term or a phrase of art in the law" differently than it was understood by the Legislature at the time of enactment. MCL 8.3a.

If this Court has no respect for the limits on its constitutional authority, it cannot expect

the executive or the legislature to keep their actions within constitutional boundaries, or call on the sovereign people to repose any faith in their attempt to create ordered government and to bind their elected representatives to the constitutionally-specified oath to support the state and federal constitutions required by Const 1963, art 11, §1. This is a situation where Henny Penny is right--the sky *is* falling, constitutionally speaking.

The Court should therefore immediately repeal all existing (or proposed) rules which function as substantive enactments, but not limited to MCR 5.801, MCR 6.401, MCR 7.202(6) (especially 7.202(6)(a)(v)), MCR 7.103, MCR 7.203, MCR 7.207(A), MCR 8.122, MCR 9.125 and 9.227, and, if it feels it simply must have rules attempting to address the subject of appellate jurisdiction for either the circuit court or the Court of Appeals, they should be of the form "The right of appeal from probate and circuit court to the Court of Appeals shall be as provided by statute. See MCL 600.861 and 600.308(1) respectively."

Respectfully submitted, Allan Falk (P13278)

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*It is recognized that the Legislature has *in part* delegated to the Supreme Court the power to promulgate rules defining the jurisdiction of the Court of Appeals by leave--but not by right. MCL 600.308(2)(e). Thus, there is no objection on this basis to MCR 7.205. But the opposite obtains with regard to appeals by leave from probate court, where the Legislature has made no similar delegation in MCL 600.863, and this Court is accordingly without authority to promulgate a rule anything like proposed MCR 5.801 or existing MCR 5.801(D).

**Again, it is recognized that federal Eleventh Amendment jurisprudence as well as many qualified immunity cases under 42 USC §1983 suggest sound policy reasons for recognizing an ability to appeal orders denying dismissal or summary judgment on an interlocutory basis. Of course, those federal cases arise in a context in which interlocutory appeals are generally unavailable, just the opposite of the situation within the Michigan state judicial system, where interlocutory appeals by leave are almost always available (and, if not, then superintending control is probably available). MCL 600.308(2) and .863. Perhaps, in a proper case, this Court might judicially decide that MCL 600.308(1) includes within its ambit orders denying summary disposition predicated on governmental immunity, or post-judgment orders involving attorney fees, as a matter of statutory construction--the undersigned doubts that this could be done without wreaking havoc with accepted rules of statutory construction or perverting the language of the relevant statutes, but the theoretical possibility cannot be gainsaid. That, however, is not to admit that, by rule, the Court may simply insert in MCL 600.308(1) provisions the Court thinks a wiser state Legislature would have included. Correlatively, neither may this Court, by rule, such as MCR 7.202(6)(a)(i), promulgate a definition of

statutory terminology which excludes from the scope of the statutory right of appeal something it has previously judicially construed as being a proper "final order" so appealable, e.g., *General Electric Credit Corp v Northcoast Marine, Inc*, 402 Mich 297; 262 NW2d 660 (1978), which is what this Court forthrightly acknowledged (unfortunately unapologetically) having done in *Allied Elec Supply Co, Inc v Tenaglia*, 461 Mich 285, 288-289; 602 NW2d 572 (1999).